

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

EXPEDIA, INC., and HOTELS.COM, L.P., )  
)  
Plaintiffs, ) No. C09-0712RSL  
)  
v. ) **DECLARATION OF CHRISTOPHER A.**  
) **COLE IN SUPPORT OF PLAINTIFF'S**  
PRICELINE.COM INCORPORATED, ) **OPPOSITION TO DEFENDANT'S**  
) **MOTION TO STAY AND DISMISS**  
Defendant. )  
\_\_\_\_\_ )

**DECLARATION OF CHRISTOPHER A. COLE**

CHRISTOPHER A. COLE, under penalty of perjury, declares as follows:

1. I am legal counsel for Expedia, Inc. and Hotels.com (collectively "Expedia"). I submit this declaration in support of Plaintiff's Opposition to Defendant's Motion to Stay and Dismiss based on my personal knowledge or where as stated, on information and belief.

2. Expedia initiated three separate challenges to Priceline's comparative savings claims before the National Advertising Division ("NAD") of the Council of Better Business Bureaus. See "How NAD Works," <http://www.nadreview.org/AboutNAD.aspx>, a true and correct copy attached hereto as Exhibit 1.

DECLARATION OF CHRISTOPHER A. COLE IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO  
STAY AND DISMISS (No. C09-0712RSL) - 1

BYRNES & KELLER LLP  
38TH FLOOR  
1000 SECOND AVENUE  
SEATTLE, WASHINGTON 98104  
(206) 622-2000

1           3.       A true and correct copy of NAD's Procedures is attached hereto at Exhibit 2  
2 (http://www.nadreview.org/09\_Procedures.pdf). The reprint of the NAD Procedures at Exhibit 2  
3 contains rules effective July 27, 2009. This edition of the NAD Procedures is identical to the  
4 Procedures in effect when the December 2008 challenge between Expedia and Priceline took  
5 place, except for a different filing fee structure. See Exhibit 3, hereto  
6 (http://www.nadreview.org/09\_sumchanges.pdf)

7           4.       In 2003, Expedia challenged Priceline ads that claimed that Priceline could save  
8 consumers 40% on hotel bookings compared to rival travel websites. A true and correct copy of  
9 NAD's decision in that case is attached hereto at Exhibit 4. See *Priceline.com, Inc./Hotel*  
10 *Pricing*, NAD Case # 4073 (Aug. 4, 2003).

11           5.       Between 2004 and 2006, Expedia brought three compliance proceedings before  
12 the NAD to enforce NAD's August 2003 decision. See *Priceline.com, Inc./Hotel Pricing*, NAD  
13 Case # 4073C (Jan. 29, 2004), *Priceline.com, Inc./Hotel Pricing*, NAD Case # 4073C II (June 3,  
14 2004), and *Priceline.com, Inc./Hotel Pricing*, NAD Case # 4073 C III (May 8, 2006). True and  
15 correct copies of these decisions are attached hereto as Exhibits 5 - 7, respectively.

16           6.       In 2008, Expedia challenged Priceline's "Negotiator" ads, which promised  
17 consumers "No Fees" for airline bookings made on Priceline.com. A true and correct copy of  
18 NAD's decision in that challenge is attached hereto as Exhibit 8. See *Priceline.com,*  
19 *Inc./Priceline.com Online Travel Booking Serv.*, NAD Case # 4951 (Dec. 22, 2008).

20           7.       In December 2008, Expedia initiated a third NAD challenge of Priceline's  
21 misleading television, internet, and print ads in which claim that consumers can "FIND HALF  
22 PRICE HOTELS EVERY DAY" on Priceline compared to Expedia. The underlying challenge  
23 materials are confidential, pursuant to NAD's Procedures, and are not attached hereto.

24           8.       In the NAD proceeding on Expedia's December 2008 challenge to Priceline  
25 advertising, Priceline submitted confidential materials to support its claims and provided Expedia  
26 with limited summaries of these materials, inhibiting Expedia's ability to review and critique

1 Priceline's data. NAD has previously noted that this also limits NAD's ability to assess the data  
2 because its view of the data is one-sided. *See, e.g., Euro-Pro Operating, LLC/Shark Infinity*  
3 *NV30 & NV31*, NAD Case # 4703 at p. 25 (July 31, 2007).

4 9. In April 2009, after the December 2008 NAD challenge was fully briefed and  
5 both parties had already met with NAD, Expedia learned that Priceline was running its new  
6 "Travelnapping" commercial, which features the "Negotiator" character. A true and correct  
7 copy of the Storyboard for the Travelnapping commercial is attached hereto as Exhibit 9.

8 10. On May 20, 2009, after Expedia filed its Complaint, my colleague Linda  
9 Goldstein, called Andrea Levine, the director of the NAD, to formally notify NAD of the  
10 Complaint and to request that NAD close the pending advertising challenge by Expedia against  
11 Priceline.com under NAD's Procedures. *See* NAD Rule 2.2(B)(i)(b). On information and belief,  
12 Ms. Levine expressed reluctance to administratively close the matter, notwithstanding NAD  
13 Rules.

14 11. On May 21, 2009, Expedia's counsel sent a letter to Ms. Levine confirming  
15 Expedia's request that NAD close the pending advertising challenge and reiterating that NAD  
16 Rules required closure. Expedia's counsel also attached a copy of the Expedia's Complaint for  
17 Ms. Levine's review. A true and correct copy of the May 21, 2009 letter from Linda Goldstein  
18 to Andrea Levine is attached hereto as Exhibit 10.

19 12. On June 8, 2009, NAD released its Case Report (referred to hereinafter as "June 8  
20 Case Report"). A true and correct copy of the June 8, 2009 Case Report is attached hereto as  
21 Exhibit 11. NAD Case Reports are made available to the NAD subscribers on NAD's website, at  
22 [www.nadreview.org](http://www.nadreview.org). The Case Report for the written advisory decision is available on NAD's  
23 website, and reported as NAD Case #5031 (June 8, 2009)

24 13. Expedia's counsel sent a letter to Ms. Levine on June 17, 2009 ("June 17 Letter")  
25 to request that NAD rescind the Case Report, administratively close the case, and to issue a  
26

1 revised report that complies with NAD Rules. A true and correct copy of the June 17, 2009 letter  
2 is attached hereto as Exhibit 12. NAD did not formally respond to the June 17 Letter.

3 14. On July 8, 2009, Expedia's counsel sent a letter ("July 8 Letter") on behalf of  
4 Expedia to Steven J. Cole, the President and CEO of the Council of Better Business Bureaus  
5 ("CBBB"), which oversees NAD. In the July 8 Letter, Expedia's counsel requested that the  
6 CBBB rescind the June 8, 2009 Case Report, administratively close the proceeding, and issue a  
7 revised Case Report in compliance with NAD rules. A true and correct copy of the July 8, 2009  
8 Letter is attached hereto as Exhibit 13.

9 15. Mr. Cole responded to Expedia's July 8 letter by correspondence dated August 5,  
10 2009. A true and correct copy of Steven J. Cole's August 5, 2009 letter to Linda A. Goldstein  
11 and Jeffrey S. Edelstein is attached hereto as Exhibit 14.

12  
13 I declare under penalty of perjury under the laws of the United States of America that the  
14 foregoing is true and correct to the best of my knowledge, information and belief.

15  
16 Executed at Washington, D.C. this 24th day of August, 2009.

17  
18 By:  \_\_\_\_\_  
19

20 Christopher A. Cole  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the 24th day of August, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Steven W. Fogg  
Corr Cronin Michelson Baumgardner & Preece LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1127  
[sfogg@corrchronin.com](mailto:sfogg@corrchronin.com)

Steven A. Zalesin (*pro hac vice*)  
Travis J. Tu (*pro hac vice*)  
Patterson Belknap Webb & Tyler, LLP  
1133 Avenue of the Americas  
New York, NY 10036  
[sazalesin@pbwt.com](mailto:sazalesin@pbwt.com)  
[tjtu@pbwt.com](mailto:tjtu@pbwt.com)

/s/Bradley S. Keller, WSBA #10665  
Byrnes & Keller LLP  
1000 Second Avenue, 38th Floor  
Seattle, WA 98104  
Telephone: (206) 622-2000  
Facsimile: (206) 622-2522  
[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)